

business telecommunications carriers to exclude non-cash assets associated with telephone and operational plant.

I. STATEMENT OF INTEREST

Ventures, Conestoga, and PVT are all interested parties that will be significantly impacted by the outcome of this rule making.

Ventures, a provider of commercial paging services, is ultimately owned by four rural Oklahoma telephone companies—Bixby Telephone and Investment Company, the Hinton CATV Company, an affiliate of the Hinton Telephone Company, Central Oklahoma Telephone Company, and Chickasaw Telephone Company. Ventures is thus a joint effort by rural telecommunications carriers to provide paging service. It plans to participate in the upcoming “lower band” paging auctions.

Conestoga is a rural telephone company that provides telephone service to its certificated service area in Central Pennsylvania. It has successfully participated in various wireless spectrum auctions through its subsidiary, Conestoga Wireless Company, in an effort to bring advanced wireless services such as Personal Communications Service (PCS) to the communities it serves, and the surrounding areas.

PVT is a rural telephone cooperative that provides local exchange telephone and advanced telecommunications services to its member-subscribers in Southeastern New Mexico. It has participated in several spectrum auctions through its subsidiaries and/or partnerships with other rural telephone companies. PVT holds licenses for PCS, Local Multipoint Distribution Service (LMDS), and 39 GHz spectrum.

All of the Joint Commenters plan to participate in future spectrum auctions, and are concerned about whether bid credits will be available to them. With the elimination of spectrum set-asides (such as the PCS “Entrepreneurs’ Block”), bid credits appear to be the only advantage that will be available for small businesses in future auctions.

II. THE COMMISSION SHOULD DECLINE TO ADOPT A “TOTAL ASSETS” TEST

The Joint Commenters understand the concerns leading to the Commission’s proposed use of the “total assets” test for purposes of determining small business status for auction bid credits. However, such a test may disqualify small entities by setting a limit that is too low, or by attributing assets that are not available to these entities for auction purposes. Indeed, small entities such as rural telephone companies, often have significant assets tied up in telephone plant necessary to serve high cost, low population density service areas. In its *Fifth Report and Order*, the Commission modified its small business definition for broadband PCS services by eliminating the net worth limit, recognizing that “a net worth could be misleading” in the “highly capital intensive business” of telecommunications. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, para. 173 (1994) (*Fifth Report and Order*). In that proceeding, the Commission adopted the total revenues test, as proposed by the Small Business Administration (SBA), because the former net worth/net revenue definition “isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises.” *Id.* at para. 175. For similar reasons, the Joint Commenters are concerned that a “total assets” test

may disqualify legitimate small businesses that may have significant embedded investment with no means to apply such assets to the auction.

A. Section 309(j) Mandates the Involvement of Small Businesses and Rural Telephone Companies in Spectrum Auctions

Pursuant to the mandate of Section 309(j)(4)(D), the Commission has a special duty to encourage certain designated entities, including small businesses, to participate in its spectrum auctions. 47 U.S.C. §309(j)(4)(D). In response to Congress' mandate, the Commission has crafted rules, which set forth elaborate revenue and asset limitations for small business and entrepreneurial status. The Commission has recognized that small businesses generally cannot prevail against large companies in auctions, and that auctions raise barriers to entry by raising the cost of entry into spectrum-based services. *See Fifth Report and Order*, at para 9. Furthermore, the Commission has the duty to ensure the "participation of small businesses with the financial resources to compete effectively in auctions." *Fifth Report and Order*, at para. 174. Adopting the proposed "total assets" limit may exclude small businesses that currently qualify as small businesses.

Adopting the "total assets" test may do more mischief than good, because it may jeopardize the ability of small businesses to provide advanced telecommunications in rural and underserved communities and would put heavily invested small businesses at a competitive disadvantage. Such a result would conflict with several proceedings instituted by the Commission specifically to foster service to tribal lands and other underserved areas. These proceedings include *inter alia* CC Docket Nos. 98-146, 96-45, and 97-160. As a matter of public policy, adoption of the "total assets" limit could have disastrous results on the future provision of such services to tribal lands and underserved areas, since these providers will be forced out of eligibility for treatment as a small

business under the Commission's rules. The Joint Commenters applaud the Commission for the policies that the Commission has aggressively sought to assist small businesses to utilize partnerships, joint ventures, and other business arrangements, that would promote access to advanced telecommunications services for all Americans. For legitimate small businesses and rural telephone companies to be deprived of bidding credits because of their existing telecommunications assets would be ironic.

B. The Affiliate Rules Adequately Account for "Front" Companies

While the Joint Commenters are sensitive to the fact that only truly "deserving" small businesses should receive competitive bidding procedures, they believe that the gross revenues test, in conjunction with a reasonable enforcement of the Commission's affiliation rules, is sufficient to define small businesses. Under the existing rules, the Commission looks at the average gross revenues for the preceding three years of the applicant and its affiliates. One of the main purposes underlying the affiliation rules is to prevent larger commercial firms from spinning off a "front" company to compete against legitimate small businesses. *See Virginia Tech Foundation, Inc., Petition for Reconsideration of Request for Waiver of Section 101.23, Order*, 13 FCC Rcd 4535, at para. 5 (1998). Unless carefully drafted and enforced, an asset test for bid credits may inhibit participation of both "front" bidders *and* legitimate small businesses.

The Joint Commenters are particularly concerned that an asset limit may have an unintended exclusionary effect because of the Commission's recent adoption of a "controlling interest" standard in its August 14, 2000 *Fifth Report and Order* in WT Docket No. 97-82. Under the controlling interest standard, the businesses of officers and

directors that do not exercise *de jure* or *de facto* control over an auction applicant may nonetheless be attributable to the applicant. For a rural telephone company that must draw its officers and directors from a limited pool of community leaders, it is not unusual to have a banker, regional hospital director, and other business leader serve on a telephone company board, often on an uncompensated basis. Under the Commission's broad, new "controlling interest" test, the assets and revenues of the bank or hospital may get lumped in with the applicant's financial qualifications. The rural telephone industry is challenging the new standard, and the Joint Commenters strongly support this challenge. Subject to the outcome of these petitions for reconsideration, the "controlling interest" standard is one more reason that an asset limit may unfairly exclude legitimate small businesses.

II. THE COMMISSION SHOULD ADOPT AN EXCEPTION FOR NON-CASH ASSETS TO AVOID PENALIZING LEGITIMATE SMALL BUSINESSES

In the event that the Commission adopts the "total assets" test, it should allow rural telephone companies and small businesses to exclude non-cash assets such as telephone or wireless plant used by *bona fide* service providers in the Commission's determination of small business status. Such assets will be reflected in the balance sheet of the applicant, and should be identifiable, especially for carriers regulated by the public service commission of the state in which they operate. Recognizing this exception will enable the Commission to distinguish between legitimate small businesses and "front" companies. As explained above, rural telephone companies are especially susceptible to being disqualified from bid credits for having substantial assets, since these companies

typically have millions of dollars of telephone and cable plant constructed for the purpose of fulfilling their “carrier of last resort” obligations. Likewise, paging companies have a substantial investment in transmitters, towers, and related assets that are necessary to furnish service to the public. These companies do not have the option to simply liquidate their telecommunications assets for purposes of generating cash to spend in an auction. Therefore, such non-liquid assets should not count against these carriers. As stated in the companion order to this rule making, in which the Commission contemplated but did not adopt additional protection mechanisms for rural telephone companies, the Commission has a “great interest in ensuring that rural and underserved areas have access to competitive advanced telecommunications.” *In re Amendment of Part 1 of the Commission’s Rules—Competitive Bidding Procedures, Fifth Report and Order*, WT Docket No. 97-82 (rel. Aug. 14, 2000), para. 51-52. The Joint Commenters propose a non-liquid assets exception since rural telephone companies and other legitimate small business telecommunications carriers would otherwise be greatly disadvantaged by the use of the “total assets” limit.

IV. CONCLUSION

The Commission should continue to recognize the vital role of small businesses, particularly rural telephone companies and small entities with large investment costs, and protect their participation in spectrum auctions accordingly. In accordance with its policy to speed the deployment of advanced services to underserved and tribal lands, the Commission should refrain from adopting the “total assets” test, unless modified to

protect the interests of legitimate small businesses by adopting a recognized exception for telephone or non-liquid plant assets.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Prendergast". The signature is fluid and cursive, with the first name "John" being the most prominent.

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